

**THE WEST VIRGINIA PUBLIC EMPLOYEES
GRIEVANCE BOARD**

**DANIEL ROBERT SPAID,
Grievant,**

v.

DOCKET NO. 2015-1636-PreED

**PRESTON COUNTY BOARD OF EDUCATION,
Respondent, and**

**PAMELA RAGIONE,
Intervenor.**

DECISION

Grievant, Daniel Robert Spaid, filed a grievance against his employer, the Preston County Board of Education, on June 23, 2015. The statement of grievance is quite lengthy describing the events leading to the grievance, but asserts that Respondent violated its policy requiring that bid sheets be placed in the bid box by 4:00 p.m. on the last day of the posting period. As relief Grievant seeks to be awarded the posted bus run.

The parties advised the Grievance Board on September 3, 2015, that they had agreed to waive levels one and two of the grievance procedure, and proceed directly to level three. A level three hearing was held before the undersigned Administrative Law Judge on December 14, 2015, at the Grievance Board's Westover, West Virginia, office. Grievant was represented by John Everett Roush, Esquire, West Virginia School Service Personnel Association, Respondent was represented by Denise M. Spatafore, Esquire, Dinsmore & Shohl, LLP, and Intervenor was represented by Jonathan Bennett, West Virginia School Service Personnel Association. This matter became mature for decision

on January 19, 2016, on receipt of the last of the parties' Proposed Findings of Fact and Conclusions of Law.

Synopsis

Grievant is employed by Respondent as a Bus Operator. He bid on a posted Bus Operator position because the bus run was in his preferred area, and he was awarded the position as the most senior applicant. After he was awarded the position, another employee came forward asserting that she had bid on the run and was more senior than Grievant. The employee, Intervenor, had a witness who stated that he had assisted Intervenor in completing a bid sheet for the position, and a witness who watched her place bid sheets in the bid box. Respondent removed Grievant from the position and awarded it to Intervenor. Intervenor completed bid sheets for two posted positions, made copies, and then placed folded pieces of paper in the bid box. Respondent never found Intervenor's bid sheet for the position at issue. Grievant demonstrated that Respondent did not receive a bid sheet from Intervenor for the position at issue. It is more likely than not that Intervenor mixed up the copies and did not place a bid sheet in the bid box for the posted position at issue. It was Intervenor's responsibility to ensure that Respondent received her application. Grievant demonstrated that he should not have been removed from the position at issue.

The following Findings of Fact are properly made from the record developed at level three.

Findings of Fact

1. Grievant has been employed by the Preston County Board of Education

("PBOE") since August 14, 2014, and is a full-time Bus Operator, and drove a bus run in the Rowlesburg area of Preston County.

2. On May 28, 2015, PBOE posted a full-time Bus Operator position for the Aurora area of Preston County. The closing date for receiving applications for this position was June 3, 2015, at 4:00 p.m.

3. Grievant applied for the posted position because the bus run associated with the position was closer to his home than the run he had been driving. The most senior applicant for the posted position was Stanley Harsh. Mr. Harsh declined the position when it was offered to him. Charles Moyers was also an applicant for the position, and his seniority date was the same date as Grievant's. A drawing was held by PBOE to break the tie between Mr. Moyers and Grievant. Grievant came out first in the drawing, making him more senior than Mr. Moyers and the successful applicant, and Grievant was told he was awarded the position.

4. After Grievant was awarded the posted position, Intervenor Pamela Ragione contacted PBOE Assistant Superintendent Craig Schmidl, asserting that she had also bid on this position, and had more seniority than Grievant. Ms. Ragione produced a copy of the bid sheet she had completed.

5. Ms. Ragione is employed as a full-time Bus Operator by PBOE, and in the spring of 2015, she had a bus run in the Fellowsville area of Preston County. Ms. Ragione stopped by the bus garage on June 2, 2015, with her son, Brody Ragione, who is also employed by PBOE as a Mechanic. Ms. Ragione completed two bid sheets while she was at the bus garage with the assistance of Chip Biggins, one for the position at issue and one for a Bus Operator position in the Terra Alta area. Mr. Biggins has been employed by

PBOE as a bus operator for about 35 years, and was filling in for the Bus Operator supervisor on the day he assisted Ms. Ragione.

6. Ms. Ragione made copies of the bid sheets at the bus garage, and then folded them and took them to the personnel office. Ms. Ragione placed what she believed were the two different bid sheets in the slot of the locked bid box outside the personnel office. Her son watched her place two folded pieces of paper in the bid box. Ms. Ragione did not have anyone in the personnel office stamp the bid sheets as received, nor did she check with anyone to make sure her applications had been received.

7. PBOE did not receive Ms. Ragione's bid for the posted Aurora area Bus Operator position.

8. After Ms. Ragione told Mr. Schmidl that she had bid on the posted Aurora area Bus Operator position, a search was conducted by PBOE personnel of the bid box and files of all positions posted around the time of the posting at issue in this grievance, and other areas where the bid sheet could have been lost. Ms. Ragione's bid sheet for the posted Aurora Bus Operator position was not found.

9. PBOE's policy on "Employment of Professional and Service Personnel," File 8-2, states with regard to applying for a service personnel vacancy, a bid sheet must be completed and, "[a]ll Bid Sheets must be deposited in the collection box located in the main lobby at the Central Office prior to 4:00 p.m. of the closing date of the posting."

10. Respondent had erroneously listed Ms. Ragione's seniority date as earlier than August 14, 2014. Her seniority date should have been August 14, 2014, the same seniority date as Grievant and Mr. Moyers.

11. After Assistant Superintendent Schmidl spoke with Ms. Ragione and received

written statements from her son and Mr. Biggins to corroborate Ms. Ragione's statement, Grievant was removed from the posted Aurora area position, and Ms. Ragione was placed in it.

12. After this grievance was filed, it was discovered that Ms. Ragione was actually tied with Mr. Moyers and Grievant on the seniority list, and a second drawing was held, with Mr. Moyers coming in first in seniority, Ms. Ragione second, and Grievant third. The record does not reflect whether Mr. Moyers was offered the position at issue.

Discussion

As this grievance does not involve a disciplinary matter, Grievant has the burden of proving his grievance by a preponderance of the evidence. Procedural Rules of the Public Employees Grievance Bd. 156 C.S.R. 1 § 3 (2008); *Howell v. W. Va. Dep't of Health & Human Res.*, Docket No. 89-DHS-72 (Nov. 29, 1990). See also *Holly v. Logan County Bd. of Educ.*, Docket No. 96-23-174 (Apr. 30, 1997); *Hanshaw v. McDowell County Bd. of Educ.*, Docket No. 33-88-130 (Aug. 19, 1988). "The preponderance standard generally requires proof that a reasonable person would accept as sufficient that a contested fact is more likely true than not." *Leichliter v. W. Va. Dep't of Health & Human Res.*, Docket No. 92-HHR-486 (May 17, 1993).

WEST VIRGINIA CODE § 18A-4-8b provides with regard to selection for service personnel positions that:

A county board of education shall make decisions affecting promotion and filling of any service personnel positions of employment or jobs occurring throughout the school year that are to be performed by service personnel as provided in section eight, article four of this chapter, on the basis of seniority, qualifications and evaluation of past service.

Qualifications shall mean that the applicant holds a classification title in his category of employment as provided in this section and must be given first opportunity for promotion and filling vacancies. Other employees then must be considered and shall qualify by meeting the definition of the job title as defined in section eight, article four of this chapter, that relates to the promotion or vacancy.

Most of the facts are not in dispute. The only issue of fact or law is whether Intervenor submitted a bid sheet which was lost by Respondent and which should have been considered. The Grievance Board has addressed this issue before, and determined that “it is the responsibility of a job applicant ‘to ensure that his interest in a given position is clearly made known and his application therefore adequately completed.’” *Crouch v. Cabell County Bd. of Educ.*, Docket No. 01-06-518 (Jan. 25, 2002), citing *Mills v. Doddridge County Bd. of Educ.*, Docket No. 90-09-402 (Nov. 26, 1990). In *Merritt v. Kanawha County Board of Education*, Docket No. 91-20-439 (February 5, 1992), the applicant asserted she had mailed the bid sheet for a position by regular mail, which was never received or was misplaced, and her application was not considered. The Administrative Law Judge in *Merritt* stated, “[i]t is the responsibility of the applicant . . .to ensure that the application is submitted to the proper personnel in charge of reviewing the application. See, *Delaney v. Harrison County Board of Education*, Docket No. 89-17-352 (Sept. 25, 1989).”

In *Crouch, supra*, Respondent required all bids to be placed in a locked box in the Central Office. Grievant alleged she had timely placed a bid for a position in the box, but Respondent, even after “[a] thorough search of multiple files and the surrounding area” of the bid box, never found the grievant’s bid sheet. In that case, no one had observed the grievant placing her bid sheet in the box, and the Administrative Law Judge found the

grievant's testimony "confusing and inconsistent." The Administrative Law Judge in *Crouch, supra*, stated that "Grievant did not check to see if her application had been received, [and] did not present any evidence to support her applying for the position," concluding that the grievant did not demonstrate "she adequately finalized her application for employment." The only difference between *Crouch* and the instant case is that in this case it is clear that Grievant did complete a bid sheet and did place a bid sheet in the bid box. The question is whether she placed a bid sheet for the position at issue in the bid box.

Another case even more similar to the instant case is *Sickles v. Monongalia County Board of Education*, Docket No. 96-30-207 (October 30, 1996). In that case the Administrative Law Judge found that the grievant had completed bid sheets for several positions, made copies of them, and placed bid sheets in a wall file holder in Respondent's central office used for accepting applications for posted positions. However, the grievant did not speak to anyone in the central office or have her bid sheets stamped as received by anyone she saw in the office, and no one observed her place the bid sheets in the wall file holder. In that case, the grievant offered no corroborative evidence, and the Administrative Law Judge concluded that the grievant did not demonstrate that she had submitted an application for the position at issue.

Finally, both parties cited *Jarrett v. Kanawha County Board of Education*, Docket No. 06-20-181 (December 14, 2006), but for opposite propositions. In *Jarrett*, Respondent allowed employees to submit their applications for positions by facsimile. The grievant had faxed two bid sheets for two positions to Respondent, and had a confirmation sheet

showing that the two pages had been transmitted. Respondent could not find a bid sheet from Grievant for the position at issue. The Administrative Law Judge concluded that since Respondent allowed application by fax, and “[g]iven this technology, it is not unreasonable for Grievant to rely on the confirmation sheet indicating two bid sheets were sent to the personnel office,” even though Grievant had not verified with any individual that his application had been received. This case frankly seems somewhat at odds with previous Grievance Board decisions, but it did not overrule any prior Grievance Board decisions; rather, it seemed to rely on the fact that Grievant did have proof that he had submitted two pieces of paper, and Grievant’s testimony that these pieces of paper were different bid sheets, one of which was for the position at issue. The undersigned does not find this type of proof here.

This case is somewhat different from the cases cited above because Grievant is not attempting to demonstrate that he submitted a bid sheet, but rather that Intervenor did not, and that her application should not have been considered. None of the parties questioned that Intervenor’s application for the position would not have been considered by Respondent had she not presented what Respondent believed was proof that she had in fact placed a bid sheet for the position at issue in the bid box. Accordingly, the only question to be decided is whether the evidence supports a finding that it is more likely than not that Intervenor placed a bid sheet in the bid box for the posted position at issue. Grievant demonstrated that Respondent did not receive a bid sheet from Intervenor. Further, there is no proof that Intervenor placed the bid sheet for this position in the bid box. Given that Respondent did not ever find a bid sheet for Intervenor for this position, the undersigned finds it more likely than not that Intervenor mixed up the copies with the

two bid sheets and placed the original and a copy of the same bid sheet for the same posting in the bid box. It was Intervenor's responsibility to exercise caution to ensure that she placed the documents in the bid box which she intended to place in the bid box. Grievant demonstrated that Respondent should not have displaced him from the posted position at issue.

The following Conclusions of Law support the Decision reached.

Conclusions of Law

1. As this grievance does not involve a disciplinary matter, Grievant has the burden of proving his grievance by a preponderance of the evidence. Procedural Rules of the Public Employees Grievance Bd. 156 C.S.R. 1 § 3 (2008); *Howell v. W. Va. Dep't of Health & Human Res.*, Docket No. 89-DHS-72 (Nov. 29, 1990). See also *Holly v. Logan County Bd. of Educ.*, Docket No. 96-23-174 (Apr. 30, 1997); *Hanshaw v. McDowell County Bd. of Educ.*, Docket No. 33-88-130 (Aug. 19, 1988). "The preponderance standard generally requires proof that a reasonable person would accept as sufficient that a contested fact is more likely true than not." *Leichliter v. W. Va. Dep't of Health & Human Res.*, Docket No. 92-HHR-486 (May 17, 1993).

2. WEST VIRGINIA CODE § 18A-4-8b provides with regard to selection for service personnel positions that:

A county board of education shall make decisions affecting promotion and filling of any service personnel positions of employment or jobs occurring throughout the school year that are to be performed by service personnel as provided in section eight, article four of this chapter, on the basis of seniority, qualifications and evaluation of past service.

3. The Grievance Board has held that, "it is the responsibility of a job applicant

‘to ensure that his interest in a given position is clearly made known and his application therefore adequately completed.’” *Crouch v. Cabell County Bd. of Educ.*, Docket No. 01-06-518 (Jan. 25, 2002), citing *Mills v. Doddridge County Bd. of Educ.*, Docket No. 90-09-402 (Nov. 26, 1990). “It is the responsibility of the applicant . . .to ensure that the application is submitted to the proper personnel in charge of reviewing the application. See, *Delaney v. Harrison County Board of Education*, Docket No. 89-17-352 (Sept. 25, 1989).” *Merritt v. Kanawha County Board of Education*, Docket No. 91-20-439 (February 5, 1992).

4. Grievant demonstrated that Intervenor did not place a bid sheet for the posted position at issue in the bid box by the application deadline, and that he should not have been displaced from this position.

Accordingly, this grievance is **GRANTED**. Respondent is **ORDERED** to return Grievant to the posted Aurora area bus run position immediately.

Any party may appeal this Decision to the Circuit Court of Kanawha County. Any such appeal must be filed within thirty (30) days of receipt of this Decision. See W. VA. CODE § 6C-2-5. Neither the West Virginia Public Employees Grievance Board nor any of its Administrative Law Judges is a party to such appeal and should not be so named. However, the appealing party is required by W. VA. CODE § 29A-5-4(b) to serve a copy of the appeal petition upon the Grievance Board. The appealing party must also provide the Board with the civil action number so that the certified record can be prepared and properly transmitted to the Circuit Court of Kanawha County. See *a/so* 156 C.S.R. 1 § 6.20 (2008).

Date: February 5, 2016

BRENDA L. GOULD
Administrative Law Judge